IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 921 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES

5. Whether it is to be circulated to the Civil Judge? : YES

DINESHBHAI DHEMENRAI

Versus

STATE OF GUJARAT

Appearance:

MR KR RAVAL for Petitioner

MR KP RAVAL, APP for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 31/07/2000

ORAL JUDGEMENT(Per J.N.Bhatt, J.)

Could it be said that the accused was afforded with an opportunity of effective and efficient hearing and paragon and promising, putative and palliative Legal Aid in a serious and major Criminal Trial, wherein, minimum sentence, statutorily, prescribed is 10 years and minimum penalty of fine is Rs.1,00,000 ? It is the heart and main theme of this Conviction Appeal, on hand.

2. In this appeal under section 374 of the Code of Criminal Procedure, 1973, the appellant-original-accused has assailed the legality and validity of the judgment and sentence order recorded by the Additional Sessions Judge on, 19th September 1998 in, N.D.P.S. Case No.3/98, whereby, the accused came to be convicted for having committed offence punishable under section 20(b)(ii) of the Narcotics Drugs and Psychotropic Substance Act, 1985 (for short NDPS Act) and after hearing him on the quantum of sentence and considering the fact that wife of the accused who is suffering from deadly disease like cancer and in whose family there is none to take care of his wife, came to be convicted minimum sentence of ten years rigourous imprisonment and fine of Rs.1 lac and in default to undergo RI for one year more.

3. The learned advocate for the accused appointed under Legal Aid Scheme, by this Court, has raised the following three contentions:

(1) That the impugned judgment and sentence could not be sustained as the accused was not afforded real and sufficient opportunity to defend his case as he could not afford private legal services on account of the extreme poverty and indigence and without understanding the nature and type of charge under NDPS Act, which carries minimum sentence of ten years and minimum fine of Rs.1 lac under section 20(b)(ii) remaining ignorant and indifferent about the scheme and the assistance of the advocate at the Government cost, which has resulted into great amount of miscarriage of justice.

(2) That the accused person was not real culprit and he became scapegoat and the real don got escaped and he is wrongly involved in the serious offence of NDPS Act. That many such innocent and indigent and underprivileged persons are made victims for saving skin of DONS and Mafias.

(3) That the entire approach of the Trial Court in

reaching to the conclusion which is under challenge is not only unjust, unreasonable, but is illegal and, therefore, the impugned conviction judgment and sentence order must be quashed.

4. After having taken into consideration, threadbare, the entire evidence, the catalogue of chronological contours, the underlying design and desideratum of providing and free and competent legal aid to the accused and without ascertaining, satisfactorily, as to whether the accused understood the seriousness of the charge and minimum sentence under section 20(b)(ii) of the NDPS Act, and also without exercising the discretion of appointing an 'amicus curiae' or powers under section 165 of the Evidence Act, while viewed in the light of the professed and pronounced purpose and object of providing free and competent legal aid to the accused for his defence, and also relevant proposition of law, we are sorry to say, with due respect, that the approach of the Trial Court in passing the impugned judgment and order is perverse and illegal, which has culminated into miscarriage of justice. We would hasten to articulate the reasons and the settled proposition of law on this score, immediately, hereinbelow.

5. The textual and contextual background of the facts emerging from the record, the aforesaid saying is, once again, repeated for the bad luck of the appellant-original-accused, despite, the fact that providing free and competent legal aid, and, that too, in a criminal trial, is not, only, a national project, policy or principle, but is a globally acceptable and recognized phenomena and fundamental Human Right.

6. It will be very interesting to, first, refer to the proposition laid down by the Hon'ble Supreme Court in "Tyron Nazareth v. State of Goa", 1994 Supp (3) SCC 321 decided, on October 26, 1993. It was submitted on behalf of the appellant-accused that in this decision, the accused came to be convicted without giving him free Legal Aid. No assistance was provided of a lawyer before the trial in a case under N.D.P.S. Act and the accused was convicted and sentenced to undergo minimum 10 years rigourous imprisonment and a minimum fine of Rs.One lac. Similar is the fact-situation in the appeal, on hand. In fairness, this submission is not disputed by the learned Additional Public Prosecutor appearing for the respondent State.

7. In Tyron Nazareth's case (supra), the Hon'ble Apex Court following the decision of Supreme Court in "Khatri-II v. State of Bihar" (1981) 1 SCC 627 and "Sukhdas v. Union Territory of Arunachal Pradesh" (1986) 2 SCC 401, held that convicted appellant was not assisted by any lawyer and perhaps, he was not aware of the fact that the minimum sentence provided under the statute was 10 years' imprisonment and a fine of Rs.One lac. Therefore, the Supreme Court, in the circumstances of the matter, had set aside the conviction and case was remanded for 'de novo' trial. It was further held that the appellant, if not represented by a lawyer, may make a request to the Court to provide him a lawyer under Sec.304 of Cr.P.C. or under any other Legal Aid Scheme and the Court may proceed with the trial afresh after recording a plea on the charges. The appeal was, therefore, allowed. The order of conviction and sentence recorded by the Special Court and confirmed by the High Court were set aside and a 'de novo' trial was ordered. The ratio propounded, in this case, is, squarely, attracted to the fact-situation of the appeal on hand. It appears that this decision was not brought to the notice of the Trial Court. It has, therefore, resulted into miscarriage of justice.

8. Similarly, in Rishinandan Pandit v. State of Bihar, Hon'ble Apex Court (2000) SCC (Cri.) 21 allowed the appeal of the appellants. Interpreting the provisions of section 386, 374, 303, 304 and 162 of the Cr.P.C. and the disposal of appeal by the High Court on merits, in absence of accused-appellant's Counsel and upholding conviction under Sec.395 and sentence of 10 years of rigourous imprisonment, came to be quashed. It was held that in view of the large number of convicts (12 in the case) and the severity of the sentence, it was advisable for the High Court to appoint an "amicus curiae" in such a case. Omission to do so, was held bad. Procedural flaws might have been averted if a Counsel was appointed to argue for the appellants.

9. All the 12 appellants were convicted by the Sessions Court under section 395 of I.P. Code and sentenced to rigourous imprisonment for 10 years each. On the date of hearing of their appeal before the High Court, their Counsel did not turn up, and, therefore, the High Court heard the Counsel for the State alone and dismissed the appeal on merits. The Supreme Court allowed the appeal. It was held that, when the Counsel engaged by the criminals in the Criminal Appeal, does not turn up, there is no obligation on the Court of Appeal to wait for him or even to adjourn the case awaiting his

presence. However, if the Counsel is absent, there is nothing in law, which precludes the Court of Appeal from appointing another Counsel, at the cost of the State, to assist the Court. It is a matter of prudence that the Court may, in an appropriate case, appoint a Counsel, at the State expenses, to argue for the case of the accused. Of course, it was for the Court to determine on a consideration of the conspectus of the case, whether it does or does not require such legal assistance. There can be appeals, which can be disposed on their own by the Counsels, if they put forth the favourable features for the accused. But, if the sentence imposed by the Trial Court, impugned in the appeal is of substantial range, it is advisable to seek the assistance of a legal talent.

10. On the facts side of the said case, the Hon'ble Supreme Court was pleased to hold that there was miscarriage of justice as the High Court proceeded to decide the appeal unaided by the arguments of an Advocate or an "amicus curiae". The stake involved in the appeal for the large number of convicted persons is, obviously, very high, particularly, in view of the sentence or rigourous imprisonment imposed on each of them. It is, in this context, it was observed that any supercilious dealing of the case will be at the risk of serious miscarriage of justice. The matter was, therefore, remitted to the High Court for disposal of appeal afresh. Upon taking into consideration the facts of that case, the Hon'ble Supreme Court directed the Hon'ble High Court that in case no Counsel for the accused turns up, it should appoint an Advocate at the State's cost to argue for the accused-appellants. The Hon'ble Supreme Court relied on its own decision in "Banesingh v. State of UP", (1996) 4 SCC 720.

11. It becomes, therefore, clear that when the charge is serious and the accused has been unaided, there is likelihood of miscarriage of justice and, therefore, it is necessary for the Court to see that the accused is properly represented. So is the factual situation in the present case. In fact, aforesaid two decisions of the Hon'ble Supreme Court are sufficient enough to allow the appeal of the accused, who could not be provided legal aid at the cost of the State. Even, no doctrine of 'amicus curiae' was invoked.

12. The accused, till properly convicted, is presumed to be the innocent, and he is required to be proved guilty beyond reasonable doubt. It is in this context the question arises:

"CAN WE, BY A PROPRIETY CONDEMNATION, DENY THE ACCUSED THE FREE LEGAL AID, WHICH LIES IN CASE PROVED, THE CONDEMNATION OF CHARGE WAS FALSE AND THAT HE IS INVERTED OF THAT CONDEMNATION?"

13. The whole basis of free and competent Legal Aid seems to rule out any of these considerations. The object is to ensure equality before the law by ensuring that those who cannot afford legal representation do not suffer because of their mere indigence or illiteracy or and disability that is a criteria. None else than Article 39-A is 'LOADSTAR' and it speaks of only economic and other disabilities as deciding factors. What is, of course, very necessary is that only those, who are really indigent, make use of free Legal Aid facility. A means and resources statement on oath, if necessary, can be required to be made before the Magistrate and accordingly, if he falls below the pre-determined poverty line, he is to be provided free Legal Aid automatically. That is not to rule out functioning of Legal Aid Boards or Authorities or involvement of Law Students and Law Schools in the Legal Aid. It must be remembered that the whole tenure of law developments, since Menaka Gandhi's case, does not support the carving out of any exception on any ground for providing free Legal Aid to the indigent, the illiterate and the ignorant and such Legal Aid, being a constitutional directive, is an end in itself and not the means to any other goal. This proposition was very well laid down and expounded by the Hon'ble Apex Court in Khatri (II) case (supra).

14. The combined and conjoint reading of the provisions of Art.22(1) of the Constitution, Sec.304 of Cr.P.C. and the provisions of Art.39-A of the Constitution and the provisions of Legal Services Authorities Act, 1987, the right of accused to enjoy the services of an Advocate or a Counsel in a criminal case is unfettered and unqualified. It is not restricted to a particular kind or classes of offences. Most of the countries in the world have made it a constitutional right to have the assistance of a lawyer or a Counsel in criminal proceedings. Under the Sixth Amendment of United States' constitution, it is provided that any of criminal prosecutions, the accused shall enjoy the right of Counsel. In short, it can very well be said that no proposition is more, clearly, established than that the person cannot be condemned without being heard. The Supreme Court of the United States in the famous case of Gideon, held that :

"This amendment provision, that in criminal

prosecutions, the accused shall enjoy the right to have the assistance of a Counsel for his defence, was, equally, applicable to the State by reason of Fourteenth Amendment."

15. The right to have Counsel by the accused has been considered so fundamental that many other countries have incorporated it in the constitution or the Bill of Rights. Under Sec.2(c)(ii) of the Canadian Bill of Rights, it is clearly provided that :-

"NO LAW AMENDED SHALL BE SO CONSTRUED OR BE APPLIED SO AS TO DEPRIVE ASSISTANCE TO A PERSON WHO HAS BEEN ARRESTED OR DETAINED AND INSTRUCT A COUNSEL WITHOUT DELAY."

16. The Japanese constitution and the International Convenant on Civil and Political Rights are instances, where Right to Counsel is recognised. No doubt, in England, there is no such right in the Common Law, but instruments like "Poor Persons' Defence Act, 1930" and "The Legal Aid and Advice Act" provide Legal Aid to poor at public expenses.

17. In India, Article 22(1) of the Constitution, expressly, provides that :

"No persons, who is arrested, shall be detained in custody, without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied of the right to consult and to be defended by a legal practitioner of his choice."

Long before the Constitution, even in the Old Criminal Procedure Code, under Sec.340, it had been provided that:

"ANY PERSON, ACCUSED OF AN OFFENCE BEFORE THE CRIMINAL COURT OR AGAINST WHOM PROCEEDINGS ARE INSTITUTED, UNDER THIS CODE, OR ANY SUCH CODE, MAY OF RIGHT, BE DEFENDED BY A PLEADER."

18. The emphasis is on "any person accused of an offence in a criminal case is entitled to be defended, as of right, by an Advocate". Sec.303 of the new Criminal Procedure Code, 1973, also, confers "a right on a person, accused of an offence before the Criminal Court or against whom proceedings are instituted under this Code, to be defended by a pleader of his choice."

19. Obviously, this right in section 304 does not

include a right to be provided with a lawyer by the State. However, Sec.304 of Cr.P.C., provides that when in the trial and more so in trials before the Court of Session, the accused is not represented by a pleader or an Advocate and when it appears to the Court that the accused has not sufficient means to engage an Advocate, the Court shall assign a pleader or an Advocate for his defence at the expenses of the State. Under Sec.304(iii), the State Government, may, by notification, direct that the provisions of sub-section (i) will apply to any class of trials before other Courts in the State.

20. Though section 304 was, newly, introduced in 1973, as there was no provision in the old Code making it obligatory on the part of the Court in a Sessions case, to assign a pleader for the defence of the accused at the expenses of the State, many High Courts issued circulars and orders, and incorporated rules in the Criminal Rules of Practice providing for assignment of an advocate for the defence of an accused in Sessions Trials and other cases of serious nature in consonance with the constitutional mandate and Fundamental Human Rights.

21. The combined reading of the provisions of Articles 14, 21, 22(1) 39-A and the provisions of Section 304 of the Cr. P.C. and the provisions of the Legal Services Authorities Act, 1987, in particular, Sec. 12, thereof, providing criteria for giving legal services, it is not the type of the charge or the nature of the offence committed, but the disability of the accused on account of indigence, illiteracy or any other disability of the accused to entitle to free Legal Services at the cost of the State.

22. The whole basis of free Legal Aid and constitutional mandate in Articles 14, 21, 22(1) and 39-A coupled with the provisions of the Legal Services Authorities Act, 1987, seem to rule out any particular nature of offence or type of charge. The design and desideratum is to ensure equality before the law by ensuring that those who cannot afford legal representation do not suffer merely because of their indigence, incapacity or illiteracy or any disability. That is the only criteria and no other yardstick is devised or formulated in the provisions.

23. Truly speaking, Article 39-A is the "Guiding-Star" and it speaks only of "economic and other disabilities" as determined and decided, guiding and governing factors. What is, of course, very significant

is that only those who are, really, ignorant and indigent make use of free Legal Aid Scheme and could take benefit. A means and resource statement on oath, may be required to be made before the Magistrate as a formality and accordingly, if he falls below the statutory poverty line, he be provided free Legal Aid automatically. However, really speaking, irrespective of economic or any other disability, to ensure fair, free and impartial trial, the accused person, in any case, in any trial, unable to procure and engage the services of a private lawyer, by economic disability or by any other reason, irrespective of the nature of the charge or the indictment, he shall have to be provided with Legal aid in defence.

24. More so, in a case, when minimum sentence of 10 years and a minimum imposition of fine of big amount like Rs.One lakh is prescribed, must be provided with legal representation. It is the duty of the Court to consider as to whether the accused person has understood the real question of charge and whether he is able to reply correctly after knowing the colour of the question. Sometimes, in a country like India, by one or the other social or psychological reasons, accused persons, unmindfully, inadvertently, without knowing the consequences, give vague and evasive replies, which, at times, have been construed by the Magistracy or Criminal courts that the ceremonial statutory process is performed and that it all !

25. At this point of time, it is incumbent upon the Court to be careful, cautious and circumspect and see as to whether the accused has, in reality, understood the tenor and the context of the question and as to whether, he has given the reply with knowledge, intention and understanding or not. The Court has not to construe, merely by asking a question as to whether the accused required Legal Aid or not, as a closed chapter and compliance of the provisions of law. At times, it may happen, then, also, it is the duty of the Court to consider as to whether in a serious, complex and capital charge or matter, the services of an 'amicus curiae' should be requisitioned or not ? It is, also, necessary to examine as to whether the powers under Sec.165 of the Evidence Act should be, successfully, utilised and employed in such trials, where accused has, without understanding the seriousness of the question, declined to accept the services of an Advocate at the cost of the Government.

26. Ultimate anxiety of the Court, always, should be

to see that an accused, who is facing serious, complex and capital charges, receives as far as possible, in one or the other mode, the help and assistance of a trained and competent person like a lawyer so as to see that he gets free, fair and objective trial, which is the 'sine qua non' of the criminal jurisprudence, and it is as such a fundamental human right.

27. It is in this context, even at the cost of repetition, we would like to refer to the decisions in "Tyron Nazareth v. State of Goa" (supra) and "Rishinandan Pandit's" (supra) cases, which are the recent decisions of the Hon'ble Apex Court and the views which we are inclined to take at this juncture, are very much reinforced by the said decisions of the Hon'ble Apex Court.

28. Apart from the provisions incorporated in section 304 of the Code of Criminal Procedure, 1973, right to legal aid, in a criminal trial is a fundamental human right. The Founding Fathers of the Constitution of India, have right from the preamble, taken a positive approach of doctrine of philosophy of Equal Justice which becomes apparent on the plain perusal of the preamble of the Constitution. Justice is not only in court of law, but justice in economic and politics. This preambular promise is further strengthened by the constitutional provisions in Articles 14, 19, 21, 32, 39-A, 51-A and 226 of the Constitution of India.

29. Article 39-A of the Constitution of India, has, again, amplified and magnified the concept and philosophy of free, fair and full justice, which reads as under:

> "39-A: Equal justice and free legal aid: - The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free Legal Aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

A plain perusal of the aforesaid provisions, evidently, leads us to believe that it is an obligation of the State Authority to provide free and competent legal aid to the persons, who are, unable to procure or engage services of a private lawyer on account of financial or any other disability. Fairness in trial of a person, who is facing an indictment is a basic feature of criminal

jurisprudence. That is how, provisions are, specifically, incorporated in section 304 of the Cr.P.C., which prescribe that legal aid shall be provided to the accused, in certain cases, at the State expenses. Section 304 reads as under:

"304. Legal Aid to accused at State expense in certain cases -- (1) Where, in a trial before the court of session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for --

(a) the mode of selecting pleaders for defence under sub-section (1);

(b) the facilities to be allowed to such pleaders by the courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1),

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and ((2) shall apply in relation to any class of trials before other courts in the State as they apply in relation to trials before courts of session.

30. A bare reading of the aforesaid provisions makes it crystal clear that in a criminal trial, the Magistrate or the Sessions Court before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence or any other disability, he is entitled to free legal services, at the cost of the State. It is, therefore, imperative for a Presiding Officer, in charge of a trial to inform every accused, who appears before him and who is not represented by a private lawyer on account of the poverty, ignorance or by any disability that he is entitled to free legal services, at the cost of the State. This proposition is, extensively, explored, and

very well expounded in various judicial pronouncements of Hon'ble Apex Court as well as of this Court. Unfortunately, it appears that the underlying design and desideratum of providing free and competent legal services to a person facing criminal charge is not properly examined and appreciated by the learned Additional Sessions Judge while conducting the trial in a serious offence under NDPS Act.

31. In our opinion, the observations of this Court made in Labhu L. Vghsiya v. State of Gujarat, 1999(1) GLR 889 and the cries raised, therein, have not been heard or brought to the notice of the Trial Court. There can, hardly, be any dispute that the right to legal aid is one of the important and fundamental human rights. Apart from the provisions made by the UNO in Charter of Human Rights, a person who is facing serious trial in a criminal Court has all the rights to have legal services for his defence.

32. The Universal Declaration of Human Rights and the Constitutional provisions enshrined in Chapters III and IV and the provisions of Legal Services Authorities Act 1987 and the provisions of Sec.304 of the Code of Criminal Procedure manifest the human rights deriving from the dignity and worth in the human beings. Articles 3, 10, and 11 of the Universal Declaration of Human Rights adopted and proclaimed by the General Assembly (UNO) Resolution 217A (III) of 10th December, 1948 and recognised and ratified by India, are as under:

"Article 3. Every one has the right to life, liberty and security of person.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial Tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.1. Everyone charged with a penal offence has the right to be presumed, innocent until proved guilty according to law in a public trial, at which he has had all the guarantees necessary for his defence."

33. This Court in Labhu's (supra) case, wherein, one of us (J.N.Bhatt, J.) was a party to the decision, has made relevant observations about the rights of the accused. Therein 28 rights of the accused-persons are enumerated and highlighted for his proper defence in para

21 of the judgment. Therefore, it would be expedient to refer to and recount them so that serious error committed by Trial Court could be obviated in future and Constitutional commands could be observed in true spirit and letter.

i. Protection against arbitrary or unlawful arrest (Art. 22 of the Constitution and Sec. 41, 55 and 151 of Cr.P.C.);

ii. Protection against arbitrary or unlawful searches (Sec.93, 94, 97, 100(4) to (8) and 165 of Cr.P.C.);

iii. Protection against "Double Jeopardy" (Art.21(2) of the Constitution and Sec.400 of Cr.P.C.);

iv. Protection against conviction or enhanced punishment under ex-post facto law (Art. 20(1) of the Constitution);

v. Protection against arbitrary or illegal detention in custody (Art. 22 of the Constitution and Secs.56, 57 and 76 of Cr.P.C.);

vi. Right to be informed of the grounds, immediately after the arrest (Art.71(1) of the Constitution and Sec.50 of Cr.P.C. as also Secs. 55 and 75 Cr.P.C.);

vii. Right of the arrested person not to be subjected to unnecessary restraint (Sec. 49 of Cr.P.C.);

viii. Right to consult a lawyer of his own choice (Art.22(1) of the Constitution and Sec.303 of Cr.P.C.);

ix. Right to be produced before a Magistrate within 24 hours of his arrest (Art. 22(1) of the Constitution and Secs.57 and 76 of Cr.P.C.);

x. Right to be released on bail, if arrested (Secs.436, 437 and 439 Cr.P.C., also Secs.50 (20 and 167 Cr.P.C.);

xi. Right not to be a witness against himself (Art.20(3) of the Constitution);

xii. Right to get copies of the documents and statements of witnesses on which the prosecution relies (Sec.173(7), 207, 208 and 238 of Cr.P.C.);

xiii. Right to have the benefit of the presumption of innocence till guilt is proved beyond reasonable doubt (Secs.101-104 of Evidence Act);

xiv. Right to insist that evidence be recorded in his presence except in some special circumstances (Sec.273 Cr.P.C., also Sec. 317 Cr.P.C.;)

xv. Right to have due notice of the charges (Sec.218, 228(2), 240(2), etc. of Cr.P.C.);

xvi. Right to test the evidence by cross-examination (Sec.138 Evidence Act);

xvii. Right to have an opportunity for explaining the circumstances appearing in evidence against him at the trial (Sec.313 Cr.P.C.);

xviii. Right to have himself medically examined for evidence to disprove the commission of offence by him or for establishing commission of offence against his body by any other person (Sec.54 of Cr.P.C.)

xix. Right to produce defence witnesses (Sec.243 of Cr.P.C.)

xx. Right to be tried by an independent and impartial Judge (The Scheme of Separate of Judiciary as envisaged in Cr.P.C., also Secs.479, 327, 191, etc. of Cr.P.C.);

xxi. Right to submit written arguments at conclusion of the trial in addition to oral submission (Sec.314 of Cr.P.C.);

xxii. Right to be heard about the sentence upon conviction (Secs.235(2) and 248(2) of Cr.P.C.);

xxiii. Right to fair and speedy investigation and trial (Sec.309 Cr.P.C.);

xiv. Right to appeal in case of conviction (Secs.351, 374, 379, 380 Cr.P.C. and Arts. 132(1), 134(1) and 136(1) of the Constitution);

xxv. Right not to be imprisoned upon conviction in certain circumstances (Sec.360 Cr. P.C., and Sec.6 of the Probation of Offenders Act);

xxvi. Right to restrain police from intrusion on his privacy (Art.31 of the Constitution);

xxvii. Right to release of a convicted person on bail pending appeal (Sec.380 Cr. P.C.);

xxviii. Right to get copy of the judgment when sentenced to imprisonment (Sec.363 of Cr.P.C.).

34. It may, also, be stated, at this stage that provisions for providing legal aid to needy and indigent persons, particularly, in criminal trial has been made, as it is reported, in more than 132 Nations out of 192 UNO member states. Even in affluent capitalist and developed democratic countries like United States, Legal Aid is provided, as of right, to needy and deserving persons facing criminal trial. The Legal Aid Corporation has been constituted, which is manned, managed and monitored by the American Bar Association and many other American Law Societies or organisation provide Attorneys. Interestingly, the provisions came to be incorporated even in the Constitution of United States by virtue of Fourth Amendment in 1789, whereby, the life, liberty and freedom is preserved and cannot be taken away without due process of law. It would be interesting to refer to the Fourth Amendment made in the United States Constitution, which came into force in 1789:

"Amendment IV.
The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Again, in the United States, by virtue of Amendment XIV, the right and liberty of a citizen is proclaimed and strengthened. It reads as under:

"Amendment XIV.
Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

> State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The right to counsel in a criminal trial is very important. In USA this aspect is very well developed. We may, therefore, peep into it. The right of an indigent accused in a criminal trial to the assistance of counsel, which is guaranteed by the 6th Amendment, is made applicable to the States. The 14th Amendment, in Gideon v. Wain Wright, 372 US 335, is not governed by the classification of the offence or by whether or not jury trial is required. It has been, clearly, propounded that no accused may be deprived of his liberty as a result of any criminal prosecution, whether felony or misdemeanor, in which he was denied the assistance of counsel is not determined by the seriousness of the crime.

35. The assistance of counsel will best avoid conviction of the innocent, an objection as important in the Municipal Court as in Court of general jurisdiction. Therefore, in our view, the opinion of US Supreme Court in Jon Richards vs. Raymond Haling, 407 US 25 is landmark and epoch-making in the realm of right to counsel for an indigent accused in a criminal trial. The 6th Amendment, which enumerated the situation, has been applicable to the States by rason of 14th Amendment and it provides specified standards for "all criminal prosecutions". The federal constitutional right to counsel is not, thus, limited to trials for offences punishable by certain amount of punishment or imprisonment. Our view is, also, therefore, very much reinforced by the decision of the US Supreme Court.

36. In William Burns vs. State of Ohio, 306 US 252, it has been held that there is no rational basis for assuming that indigent's motions for leave to appeal are less meritorious than those of other defendants ("accused"). The imposition by the State of Finance's barriers restricting the availability of appeal of review for indigent criminal-defendants has no place in the American heritage of criminal justice under the law.

37. In "Lawrence Long vs. District Court", Iowa, it has been decided that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state-right to sue for his liberty is to deny the prisoner, the equal protection of laws. In this case, US Supreme Court reversed the opinion of

Supreme Court of Iowa and unanimously decided in favour of the accused, who was indigent-prisoner. Equal justice is interpreted ingeniously and it has been held that there can be no equal justice, where the kind of trial a man gets, depends on the amount of money he has. The 14th amendment of US Constitution requires, whereas, the State grants the Right of Habeas Corpus, rich and poor prisoners are to be treated alike.

38. It is interesting to note that in Annie Harper vs. Virginia State Board of Elections, 383 US 663, the US Supreme Court rendered the opinion while interpreting the expression "due process". The "due process" clause of 14th amendment does not enact economic theories of a particular era. The "equal protection" clause of 14th amendment is not shackled to the political theory of a particular era. Where fundamental rights and liberties are asserted under the equal protection clause, classifications, which might invade or restrain them, must be closely scrutinized and carefully confined. The opinion of US Supreme Court, in this case, is of historical interest on the constitutionality of discrimination as regards the property right classifications or payment of tax as a condition of right to vote.

39. On the other hand, apart from many developing countries, even in a country like, China, a communist country, right to free legal aid in a criminal trial is made, statutorily, mandatory. Such a provision in the realm of legal services has been made effectively and efficiently in various Western and European countries.

40. There are several reasons why, the right to legal aid or to avail legal services in a country like India, which is under-developing, democratic republic, wherein, the 'Welfare State' doctrine has been adopted, assumes wider significance. There are several reasons, aspects and facets prevalent in this country, which would prompt to have a very effective, useful and efficient infrastructure for providing free and competent legal aid in a country like India, where, less than 33 per cent of the people know how to write and read sufficiently and usefully. It is in this context, the provisions for legal services have been made in the Constitution as well in the Legal Services Authorities Act, 1987, over and above the provisions made in section 304 of the Criminal Procedure Code, 1973.

41. It would be fruitful to mention the steps

suggested in England to assist the unaided and unrepresented accused who is known as 'defendant' in England in Magistrates Court. In 1966, a Committee was appointed under the Chairmanship of Lord Chief Justice Widgery, known as 'Widgery Commission' to consider the question of legal-aid in criminal proceedings and submit its report. Unfortunately, the report was found not satisfactory by the British Section of the International Court of Jurists. A Special Committee was appointed known as 'Justice in 1970' and it submitted its report in 1971, wherein, it has been observed that the Criminal Legal Aid System in Magistrates Court was not working, as fairly as, it should, and that, most accused persons in Magistrates Courts were unaided or unrepresented.

42. It was, therefore, suggested to establish a "Duty Solicitor System", similar to the system operating in Scotland and Ontario. In such a system, a solicitor appointed from the Legal Aid Panel attends at Court, prior to the Court-sitting and interviewing the accused, coming before the Court for the first time. He would tender advice as to which plea should be taken by the accused or defendant, including plea in mitigation and also applies for bail or for adjournment, if necessary. He could also advise him on the need for applying for legal aid. The Widgery Committee had rejected such a proposition, essentially, on the ground of shortage of Barristers and solicitors, where, the Justice Committee pointed out that such a task is not insuperable.

43. At this stage, it would be interesting to refer to the innovative scheme known as, "The Scheme of Legal Aid Counsel" introduced by the National Legal Services Authority's Patron-in-Chief and Chief Justice of India, Hon'ble Dr.Justice A.S.Anand, and the Executive Chairman and Judge of the Supreme Court, Hon'ble Mr.Justice S.P.Bharucha. Such a scheme is introduced in almost all-magisterial courts in Gujarat and it is, also, reported that in almost all criminal courts, such a scheme has been implemented. The role of the Supreme Court and the NALSA in the realm of Legal Aid and ADR has been outstanding and excellent.

44. By virtue of the provisions of Articles 21 and 22(1) and 39A of the Constitution of India, and Section 304 of the Criminal Procedure Code and, also, the provisions of National Legal Services Authorities Act, 1987, and the dynamic interpretation of Supreme Court and innovative schemes of NALSA, legal aid has been elevated on a very high pedestal in India. In will, also, be interesting to refer the judicial creativity and activism

of the Hon'ble Apex Court manifested in Maneka Gandhi v. Union of India (AIR 1978 SC 597). It will be heartening to find that the highest court of the land has given this landmark decision in which the following observations in the matter of free legal-aid for indigent, litigants are very pertinent.

> "The procedure under which a person may be deprived of life or liberty should be "reasonable, fair and just", now, a procedure, which does not make available the legal services to accused-person, who is poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just."

45. In the present case, also, in our opinion, there cannot be said to be a reasonable, just, free and fair trial in a serious charge against the accused. Not only that he is not a trained person, but also, due to the fact that while making a statement that he would himself defend, he was not informed about the seriousness of the charge, minimum sentence of 10 years and a minimum fine of Rs.1 lac, on being found guilty. Simply because he did not say 'yes' to a question of the Court on being asked about legal-aid, without understanding the seriousness, the intricacies, the implications and the minimum statutory prescription of sentence of 10 years and a fine of Rs.1 lac, would not change the scenario. Of course, legal aid cannot be thrust against the wish of the accused when he has voluntarily, evidently and after understanding and exercising his option in refusing or accepting legal-aid.

46. The object and design of the provisions of Sec.304 of Cr.P.C. is that legal-aid should be provided to a poor or an indigent unaided accused in a sessions trial case and it is a mandatory duty. Sec. 304(1) of the Criminal Procedure Code, in fact, gives effect to the recommendations of the Law Commission for making legal-aid available in all trials before the Court of Sessions. The accused was tried before the Court of Sessions and, the record does not show, clearly, that we can say that we are satisfied that he had replied to the question of the Trial Court on the point of legal-aid, understanding or exercising his faculty of mind or his intelligence, and, again, it is aptly manifested from the record and, also, admitted even, by the learned APP appearing before us, that there is nothing on record to suggest that the accused was given to understand by the

Sessions Court that the offence with which he was charged, carries a minimum statutory sentence of 10 years and fine of Rs.1 lac. So, on both counts, factually and legally, the trial against the accused before the Sessions Court cannot be characterised as "reasonable, fair and just".

47. The Hon'ble Apex Court has, also, in the following epoch-making decisions, lucidly, expounded the principles of providing free legal aid and fairness in criminal trials and the rights of indigent accused persons:

i. Ram Krishan Bhardwaj v. State of Delhi, AIR 1953 SC 318.

ii. M.H.Hoskot v. State of Maharashtra (1978) 3 SCC 544.

iii. Hussainara Khatoon (IV) v. Home Secy., State of Bihar (1980) 1 SCC 98.

iv. Hussainara Khatoon (V) v. Home Secy., State of Bihar (1980) 1 SCC 108.

v. Kadra Pahadiya v. State of Bihar (1981) 3 SCC 671.

vi. Khatri (II) v. State of Bihar (1981) 1 SCC 627.

vii. Munna v. State of U.P. (1982) 1 SCC 545.

viii. Sheela Barse v. State of Maharashtra (1983) 2 SCC 96.

ix. Suk Das v. Union Territory of Arunachal Pradesh (1986) 2 SCC 401.

x. Sheela Barse v. Union of India (1986) 3 SCC 596.

xi. Centre for Legal Research v. State of Kerala (1986) 2 SCC 706.

xii. Bajiban Salambhai Chauhan v. U.P. State Road Transport Corporation (1990) Supp SCC 769.

xiii. Kishore Chand v. State of H.P. (1991) 1 SCC 286.

xiv. State of Maharashtra v. Manubhai Pragaji Vashi (1995) 5 SCC 730.

48. There are innumerable reasons why Free and Competent Legal Aid in India is, extremely, imperative and should be liberally construed. Therefore, it would be appropriate and expedient to highlight some of the significant facets and features, at this juncture, in nut-shell, which are as follows:-

(i) India is largest Democratic, Republic, Secular State which has adopted the doctrine of Welfare State and has followed Welfare State's doctrine.

(ii) Almost 50 per cent of our population constitutes women and, undoubtedly, in the present social set up, there is, unfortunately, still undesirable strong gender-bias in practice. And majority of them are in rural areas and illiterate.

(iii) Out of the total population of the women in this country, almost less then 50 per cent is literate.

(iv) Most of the rural people in India resides in more than 5,18,000 villages who are either illiterate indigent or ignorant of their rights. They have started to look upon the system as a foe and not a friend, which is, undoubtedly, an unhealthy syndrome.

(v) Pending work load of cases in Indian Courts has rapidly crossed the 30 millions as per latest survey, and many more are under inquiry or investigation stage, etc.

(vi) Roughly, 91 per cent of cases instituted in the Courts go for trial and only 9% of cases are settled without judicial agitation, which is reverse in the USA. Thus in USA, more than 90% of cases involving legal disputes are settled before they go for trial.

(vii) The ratio of judges per million in India is almost 9, whereas, it is more than 115 in U.S.A. Even in a country like Pakistan, the ratio is more than the ratio in India.

(viii) In case of ratio of advocates available, in India, is far less than developed countries. There are about only 4,50,000 and odd numbers of

advocates in India which has populous of 1 billion.

(ix) Even in case of urban populous most of them are ignorant about their legal rights, who are otherwise, literate. The urbanised populous lack awareness about their Legal Rights.

(x) The life span of a civil case or a law suit in civil side, is ranging, average, between 8 to 12 years. Who knows even after a successful decision or order in favour of a party, whether he would be able to see light at the end of tunnel after having passed through the long legal and procedural conduit pipes?

(xi) The Courts have to interpret, analyse and apply the provisions of law in the beginning of the 21st Century, which are made more than 8 to 9 decades old. Some of them are even century old and even more. Let us not forget that there is nothing constant except 'change'.

(xii) Our traditional Legal system is founded upon British legacy which had a basis and basion of Roman jurisprudence which historically proved to be a great and grand failure in terms of local and personal in terms of Indians.

(xiii) Even after decree award or order passed on judicial side in favour of a party, after numbers of years, successful party has to again undergo the second round of litigation at the stage of execution. Is it not a Pity v. Duty ?

(xiv) Our present traditional system of justice is suffering from 3 main maladies and unhealthy syndromes.

(i) Huge and heavy expenses
(ii) Unexpected and unpredictable inordinate delay in disposal,
(iii) Cumbersome and complex process of Court.

(xv) In view of the failure to provide easy, cheap and expeditious accessibility, mental barrier is developed amongst many persons to suffer injustice. As a result of which, a common man has started looking at it, as foe rather than, a friend.

(xvi) The country like ours, the largest democratic welfare state, in which Rule of Law has been recognised as one of the basic features of the Constitution.

(xvii) Majority of the people are poor or indigent and most of them live below the poverty line, even though poverty line is drawn liberally and not upon an International Standard.

(xviii) The voice of the litigant who is the heart of the system is soft and weak. It is drowned out by the roar of fear. It is ignored by voice of desire. It is contradicted by the voice of some strong. It is hissed away by hate and finally extinguished by fire of anger.

(xix) The Legal Aid which aims at providing free and competent Legal Aid, which is protective as well as preventive aspect assumes higher degree of importance, when we have astronomical arrears in our courts, at present.

(xx) The Legal Aid system covers all the 3 stages prepending and post litigation. Therefore, by mediation or any other effective Alternative Dispute Redressel (ADR) Forum dispute can be resolved. National Legal Service Authority (NALSA) has reported that more than 50,000 cases have been settled at pre-filing stage, out of which more than 18,000 cases have been finally settled in Gujarat by, GSLSA.

(xxi) Legal Aid under the Legal Services Authorities Act, 1987, has become a mission whereas it was a vision earlier and right from the Highest to the Lowest Court mechanism under the direction and guidance of NALSA has been set up.

(xxii) Legal Aid means to assist or provide some help to the needy, whereas, under the 1987 Act, the concept is changed and Legal Aid is substituted by Legal Services. It is also the duty to provide it.

(xxiii) The revolutionary evolution of resolution of dispute by one or other means, ADR has been, successfully, translated in various countries.

(xxiv) It promotes dispensation of socio-economic

justice to the deserving indigent who is wronged or done injustice.

(xxv) It is a means to achieve the end enshrined in the Constitution to reach the goal of equal accessibility to the justice system.

(xxvi) The weaker section, viz. Scheduled Caste and Tribes, underprivileged, oppressed and depressed, destitutes and deserted millions of illiterate and ignorant have started losing faith in the traditional system. It can, hardly, be denied that in the present set up of the society, corruption has not only become endemic but also epidemic. Therefore, easy and speedy access to justice for a common man is imperative.

(xxvii) 34 per cent of the total world's poor populous is in India. More than majority persons live below poverty line. Even in state like Gujarat, as per latest survey 39 percent population, in reality, lives below poverty line.

(xxviii) UNICEF has declared the year 2000 as International Year of culture of peace. The preventive and protective Legal Aid creates jurisprudence of peace.

(xxix) Legal Aid is in full swing even in a rich country like USA, where, average annual per capita income is more than $ 27,000 whereas it is almost $ 350 in India.

(xxx) Juridicare is equally important, if not more than the medicare, for the survival of the rule of Law. It, also, revives, rejuvenates, restatements and for revivification of values and ethos. It helps to create renaissance of National Legality and provides a rendezvous for social, amity, and affinity and social justice.

(xxxi) It is no longer a plan but it is a pledge. It is no longer a chart, but a charter. It is no longer a cry or call but a creed. It is, therefore, necessary to consider to have (i) National Legal Aid Corporation, (ii) National Equal Access to Justice Library for better monitoring and Management of Legal Aid and providing competent Legal Aid to poor and not the poor Legal Aid.

(xxxii) It aims at promoting larger interest, harmony, comity and polity and jurisprudential cohesion and environment.

(xxxiii) It creates not only peace but a culture of compromise. In our country, amount spent or expenditure for administration of law and justice is reportedly 0.2 per cent of the Gross Domestic Product (GDP) which is grossly inadequate and insufficient in a democratic set up. It is, therefore, necessary to constitute a regular mechanism, whereby, we can take and evaluate Judicial Cardiogram for necessary urgent and useful, effective and ebullient reforms to translate constitutional mandates and obligation propounded right from Preambular Promise in their fighting faith by its Founding Fathers, a reality.

(xxxiv) As per the report of World Health Organisation, (UNO Aids) the victimization of children and women due to various health syndromes is very high in India, apart from regional disparities and bias.

(xxxv) It is also reported by the UNICEF that in the year 2000, India will be the world's most illiterate nation.

(xxxvi) It is further reported by the UNICEF that India has maximum school drop out and every third illiterate in the world is an Indian.

(xxxvii) The custodial violence, investigating abuses and social exploitation pose the greatest challenges to the human rights in India.

(xxxviii) It is necessary, in view of the retrogation in authenticity of judicial system value. The right corrosion in the public life and ethical value and moral ethos have been in fall-downward swing.

(xxxix) We have reached a situation where law and justice in many cases becomes distant neighbours. Despite the accepted

practice and norms of having a separate court or a judge per about 700 cases in India as per the last report, average, work load is exceeding per Court 5600 and again it is reported that in a court of Metropolitan City like Ahmedabad work-load per Court is almost around 70,000 cases. In many courts, cause list or popularly known as Board of the day of the cases, runs into more than two hundred cases a day, one would be tempted to say that there is high time for scientific court management and Legal and Judicial continuing education and training.

(xl) It must be remembered that the present system is diabolic and dilatory instead of being dialectical and speedy.

(xli) A common man has started feeling that justice itself is on trial. It is, therefore, imperative to evolve effective and efficient strategies both preventive and protective:

(1) To manage : Unmanageable
(2) To break : Unbreakable
(3) To beat : Unbeatable
(4) To hit : Unhitable
(5) To defend : Indefensible.

(xlii) Looking to the present situation in the country, we are obliged to create and constitute a Neo Jurisprudence, a public oriented participation performing, progressive, professional and pervasive, programmes.

(xliii) Legal education must, urgently, be upgraded if the grammar of anarchy is not to invade the Bar, the Bench and constitutional order. It is necessary to consider various modern ways and means for high order of Legal Aid and ADR, like use of the Information Technology and also the concept of 'PLEA-BARGAIN' which is in practice in US, UK, France and many other countries and reported to be productive, at least to begin with certain petty offences and earmarked or defined minor offences, wherein, individual interest and not the Public Interest or Policy is involved and on experimental basis and that too within the monitoring and controlling supervision of courts.

(xliv) To save the Nation, a catalytic role has to be played by Legal Aid in the larger interest of weaker section. NALSA has undertaken various important and effective and appreciable Legal-Aid programmes and, therefore, members of Bench and Bar, NGOs and Governmental Agencies must render voluntary helping hand in such noble and novel projects.

(xlv) Unfortunately, in the present system, the litigant, who is the heart of judicial anatomy, is the most neglected segment. He is the consumer of justice and he should be respected. The litigant - consumer of justice - and heart of our system - must receive equal, effective, inexpensive and speedy trial and justice.

(xlvi) It is imperative to reach the goal of 'Equal access to justice', which is a constitutional commandment and statutory imperative. Jurisprudential history speaks, unequivocally, that the concept of equal justice came to be manifested in the ancient and early laws. Even in a classic statement, Magna Carta, in its most glorious enunciation in 40th para, evidently, has inscribed, "TO NO ONE WILL WE SELL, TO NO ONE WILL WE REFUSE OR DELAY RIGHT OF JUSTICE."

(xlvii) Legal-Aid is not a charity or a chance but, as stated, it is a constitutional mandate to the State and right of public, which is not, now, an opinion, but a constitutional obligation and compulsion. As such, it is not a pledge or a plan of a Government, but has assumed, the status of peoples' movement. Somebody has, rightly, said, "What is the use of the system, which does not help lowly and lost, poor and downtrodden and which creates distance between law and justice."

(xlviii)Needless to state that Legal-Aid becomes legal service in real sense when it becomes accessible to the subjects of its objects and when they get benefit by taking advantage of impartiality and integrity of the system.

(xlix) Legal Services Authorities and Committees and institutions providing free legal aid ought to be sufficiently funded by the State and must receive adequate support and ample assistance from the civil service, which is badly required. It

should, also, liberally be assisted by the Bench and the Bar between whom always exists an unbreakable, irrevocable and irretrievable partnership.

(l) In various countries, particularly, in United States and other Western countries, the contribution of the Bar in rendering free and competent legal-aid is praiseworthy and it must be emulated. Legal Aid fraternity must respond with juristic sensitivity to the voice from the silence zone (a class of litigants) and mass voice of weak, meek, poor, suppressed and exploited, women, and destitute children so as to create evolving ebullient echo for the silent sector. The Bar must evolve scheme to ensure that unprotected is not priced out of Market. The Bar is, really, a backbone of the legal services to compliment and complete the constitutional obligations and obtain statutory rights of millions of indigent, needy, handicapped and deserving people.

49. It may, also, be mentioned that the accused stated before the Trial Court that he would defend in person or by himself. Probably, this statement at the time of recording the plea after framing the charge led the Trial Court to believe that the duty of the Court is over and it is for the accused to face the consequences, as he desired to defend himself. In our opinion, it is not a correct perception or proposition of law. The duty of the Court does not cease on having heard the party in person, when he is facing serious charge and, that too, under NDPS Act, wherein, the minimum sentence is that of ten years. It appears from the record that the Trial Court, had not drawn the attention of the appellant-accused that the minimum sentence prescribed on finding of guilty, under section 20(b)(ii) of the NDPS Act is, to undergo minimum punishment of ten years and to pay a fine of Rs.1 lac.

50. Obviously, such a fact situation, not only, entails serious consequences adverse to the accused facing criminal trial on such a serious charge, but would also culminate into unfairness and serious prejudice to him in holding the trial against him in a sessions case. The fairness of trial is the 'sine qua non' in any criminal trial. Law without justice is blind, whereas, justice without law is lame. It is, therefore, the duty of the Presiding officer to be alive to the provision of

law, more so, in a case, like the one on hand, to draw the attention of the accused, about the resultant effect in not availing legal aid benefit, which does not seem to have happened in the present case, in course of the trial. Therefore, even on this sole ground of failure to bring such a thing to the notice of the accused, when he desired to defend himself without proper understanding, which would, in reality, tantamount to unfair and unjust trial. Therefore, from the entire record, in our opinion, there was no free, fair, full, just and reasonable trial without which no person or delinquent could be condemned or convicted.

51. We have, also, not been able to comprehend as to why the Trial Court, in such fact situation, for holding a fair and free, just and reasonable trial did not resort to the provisions of section 165 of the Evidence Act, 1872, which, undoubtedly, empowers a Judge, in order to discover or obtain proper proof of the relevant facts to ask any question to the witness. Section 165 of the Indian Evidence Act, reads as under :

"165. Judge's power to put questions or order production:- The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question order order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that, this section shall not authorize any judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

52. In an adversarial system, to which, we have wedded, it becomes not only the right of the accused to have free and competent legal aid for his defence for fair and free trial, but it becomes mandatory for the Court to provide competent legal aid to the accused in defence, when he is found disabled to procure service of a private advocate for his defence or, in a case, where, he himself embarks upon conducting the trial and, who, is an ignorant, illiterate, unsophisticated villager or even a literate who is not a legally trained person, and more so, when he is going to be visited with minimum sentence of 10 years or to consider alternative of engaging services of lawyer under the concept and philosophy of 'amicus curiae'.

53. Even in a case of conviction appeal, at the instance of the accused and though he has engaged a private advocate at his own cost, when remains absent on the day of hearing, it would not be expedient or proper for the Court to decide the conviction appeal without appointing an 'amicus-curiae' for the defence of the accused, who would be able to highlight the favourable points to the accused. Therefore, even disposal of conviction appeal in absence of private advocate engaged by the accused on merits without the help of competent legal aid or help to the accused either under the legal aid scheme or under the concept of 'amicus-curiae', may, undoubtedly, end in many cases, in a fruitless and useless conduct of trial or appeal adverse to the interest of the accused and, obviously, it would culminate into miscarriage of justice.

54. It is, therefore, very clear that when the counsel engaged by the convict in a criminal appeal does not turn up and make his submissions on the merits of the case, there is no statutory obligation on the Court of appeal even to adjourn the case awaiting his presence. Nonetheless, if the counsel is absent, the Court can appoint another counsel at the expense of the State to assist the Court, or in an appropriate and given case, the Court can consider to appoint an 'amicus curiae'. No doubt, it may not be necessary in all the cases. The Court must be alive to the situation and, if Court is, prima facie, of the opinion that after having taken into the entire conspectus of the facts and law, though the appointment of another counsel at the State expense or to engage an advocate as an 'amicus-curiae' for the effective and efficacious disposal of the criminal case or the appeal. Of course, there may be some appeals, which would be disposed of without the assistance of the

advocate.

55. But there may be some matters, wherein, minimum sentence is prescribed and serious charges are levelled and also considering the complexities and the quality and the quantity of the evidence, if the Court finds that there is a substantial points to be decided, obviously, then it would be advisable to seek the assistance from legally trained talent or help of a counsel. This view is also very much reinforced by the decision of Hon'ble Apex Court in Rishi Nandan Pandit v. State of Bihar, 2000 SCC (Cri) 21. In that case, the Hon'ble High Court of Patna had disposed of an appeal on merits in absence of accused-appellant's counsel while upholding conviction under section 395 and passing an order of sentence of 10 years rigourous imprisonment. It was held by the Hon'ble Apex Court that looking to the number of convicts and the severity of sentence it was advisable for the High Court to appoint an 'amicus-curiae' in such a case and omission to do so would end in miscarriage of justice.

56. It would, also, be interesting to refer to a decision rendered by the Hon'ble Supreme Court in Bani Singh v. State of UP, (1996) 4 SCC 720, taking a view that the decision in Ram Naresh Yadav v. State of Bihar, AIR 1987 SC 1500, was erroneous and further making observation, in para 15, at page 726, which are very pertinent:

> "We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so."

In short, even in absence of a counsel appointed by the accused for its defence in appeal, as a matter of prudence, the Court may, in appropriate case, appoint a counsel at the State expense to argue for the accused or to appoint an "amicus curiae".

57. The appellant-accused came to be tried by the learned Additional Sessions Judge, Vadodara, on the serious charge of his having committed offence punishable under section 20(b)(ii) of the NDPS Act in which minimum sentence period is 10 years and a fine of Rs.1 lac,in N.D.P.S.Case No.3/98. The charge was framed, at Ex.5,

and the plea was recorded of the accused, at Ex.6. The accused pleaded not guilty. On being questioned about his defence or to get an advocate under legal aid scheme, the accused replied that he would fight out himself and he would defend in person.

58. That is how, legal aid was not provided and the object of the doctrine of Free and Competent Legal Aid was not, seriously, considered and even an "amicus curiae" was not appointed. The Court did not resort to the provisions of section 165 of the Evidence Act. Upon completion of the trial and after examining evaluating and appreciating the evidence of the prosecution, the accused was found guilty under section 20(b)(ii) of the N.D.P.S. Act by the Trial Court on 19.9.98. Immediately, thereafter, the accused was called upon to make submissions on the quantum of sentence on the same day, wherein, he pleaded that his wife is, seriously, ill and as she is suffering from cancer and he is very poor person and doing small job, and wrongly involved, and therefore, mercy was sought by the accused.

59. The Trial Court, after considering the facts and circumstances and after hearing the accused, sentenced him to undergo 10 years RI with a fine of Rs.1 lac and in default to undergo further imprisonment RI for one year. Ten years imprisonment is the minimum sentence. Likewise, fine of Rs.1 lac is also minimum amount of fine in case of such an offence. It also appears that the classic exposition of doctrine of Free Legal Aid and speedy trial and underlying design and desideratum expounded lucidly by Hon. Apex Court in "State of Maharashtra v. Manubhai Pragaji Vashi, (1995) 5 SCC 730, had not been brought to the notice of Trial Court.

60. Being aggrieved by the said conviction judgment and sentence order, the original accused has filed this Criminal Appeal through jail, challenging the legality and validity of the same. Therefore, service of free and competent legal aid by appointment of an advocate came to be given to him. Thus, the accused is defended by an advocate in legal aid, in this appeal.

61. In the light of the observations, discussions and settled proposition of law, with regard to providing free and competent legal aid and the entire factual scenario emerging from the record, We are of the opinion, that the Trial Court has committed serious error in not providing free and competent legal aid or the services of a competent advocate in defence of the accused before the Trial Court when minimum sentence prescribed is RI for 10

years and minimum fine of Rs.1 lac, which has resulted into miscarriage of justice. Could it be said to be a free and fair, just and reasonable trial, as contemplated by the principles and practice of criminal jurisprudence, to which we have wedded ? Obvious and spontaneous reply will be in negative. Therefore, the only course open for us is to quash the impugned judgment and order and to send the matter back to the Trial Court for trial 'de-nova' after passing appropriate order for providing legal aid to the accused, in the light of the directions, observations and the principles laid down, hereinbefore, by us, and in the light of celebrated principles of law in this behalf.

62. In the result, the appeal is, accordingly, allowed. The impugned judgment of conviction and order of sentence shall stand set aside and quashed. The matter is ordered to send back to the Trial Court for trial 'de-nova', after observing the requisite procedure for providing legal aid to the accused in his defence, as expeditiously as possible, and preferably within a period of four months from the date of receipt of file from this Court, since accused is in Jail, in the larger interest of justice.

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(vjn)